SUPREME COURT, U. S.

SEP 8 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967, No. 591

I. WILLIAM BIANCHI, JR., QUENTIN B. SAMMIS and THE TOWN OF HUNTINGTON,

Petitioners,

against

EVANS K. GRIFFING, ET AL., Constituting the Board of Supervisors of Suffolk County, New York.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, before judgment in that Court, to review a judgment of the United States District Court for the Eastern District of New York filed July 22, 1967.

Citations to Opinions Below

The opinion of the District Court filed April 8, 1963 is reported at 217 F. Supp. 166. The opinions of the three judge district court filed respectively February 1, 1965 and June 15, 1966 are reported at 238 F. Supp. 997 and 256 F. Supp. 617. A direct appeal to this Court from the February 1, 1965 decision and the order entered thereon was dismissed for lack of jurisdiction (R. 124;* 382 U. S. 15).

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* References are to pages of the original record to be filed with the Court.

This Court's decision of May 22, 1967 is reported at 87 S. Ct. 1544. The June 29, 1967 decision of the District Court which is sought to be reviewed is not yet reported and is reprinted as Appendix C to this Brief. The July 22, 1967 judgment thereon is printed as Appendix D.

Jurisdiction

The judgment of the District Court was entered July 22, 1967. An appeal to the United States Court of Appeals for the Second Circuit was taken by petitioners Sammis and The Town of Huntington on August 3, 1967. An appeal to said Court was taken by petitioner Bianchi on August 4, 1967. The appeal was docketed in the office of the Clerk of the United States Court of Appeals, Second Circuit on August 30, 1967 as Docket No. 31652. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and Rule 20 of the Rules of this Court.

Questions Presented

1. Whether a county charter providing that the legislative and policy determining board of the county should be composed of supervisors of several towns and that each supervisor should have one vote violates the Equal Protection Clause of the Fourteenth Amendment, where the towns vary in population from 1400 persons to 172,000 persons.

2. Whether a single judge of the District Court either exceeded his power or abused his discretion in dismissing a complaint charging malapportionment of a county governing body, after this Court vacated a prior judgment of a three-judge court convened pursuant to 28 U.S.C. § 2281, of which he was a member, which judgment had upheld the complaint, had imposed a temporary reapportionment plan upon the county governing body and had directed said county governing body to adopt a permanent plan of reapportionment and to submit same to a referen-

dum, where this Court's vacation of the three-judge court's order was on the sole ground that the case was not one for three-judge determination and, hence, this Court had no jurisdiction over a direct appeal, and where this Court remanded the cause to the District Court so that it "may enter a fresh decree from which appellants may, if they wish, perfect timely appeals" to the United States Court of Appeals.

Constitutional Provisions and Statutes Involved

The constitutional provision is the Equal Protection Clause of the Fourteenth Amendment. The statutes involved are 42 U.S.C. §§ 1983 and 1988; 28 U.S.C. §§ 1343 (3) and 1343 (4); 28 U.S.C. §§ 2201 and 2202; and Laws of New York 1958 c. 278 §§ 201 and 203, all set out in pertinent part in Appendix A.

Statement

This action, alleging invidious discrimination in the statutory representation scheme mandated by New York state law for the Suffolk County Board of Supervisors, was commenced July 27, 1962 (R. 11). On April 8, 1963 the District Court, Hon. Walter R. Bruchhausen, J., denied a motion to dismiss the complaint without prejudice to its renewal before a three-judge court which was thereafter convened by Judge Bruchhausen pursuant to the provisions of 28 U.S.C. §2281 (R. 68-73; 217 F. Supp. 166). Judge Bruchhausen was a member of the three-judge court.

The motion to dismiss was renewed, and the parties stipulated in open court on September 30, 1963 that the Court would "regard it as a motion for summary judgment, . . . [and] in view of the stipulated factual situation as if a trial had been held, so that [the] forthcoming decision . . . ought to be able to regard this not as a motion attacking a mere pleading but as disposing of the issues on such matters as may exist" (R. 506-507).

On February 1, 1965 the three-judge court denied the renewed motion to dismiss, declared the respondent Board of Supervisors to be "not representative of the voters of the county as the Supreme Court has indicated is required of legislative bodies under the Equal Protection Clause" (R. 98), but denied petitioners' application for injunctive relief "without prejudice to the renewal in the absence, within a reasonable time, of the political action afforded governmental bodies to be taken as indicated in the court's decision herein" (R. 84-102; 238 F. Supp. 997). A direct appeal to this Court on the part of respondents was dismissed for want of jurisdiction (R. 124; 382 U. S. 15). On December 16, 1965 the three-judge court reconvened on plaintiff's motion and granted permission to the petitioner, The Town of Huntington, to intervene as a party plaintiff (R. 134-211).

By decision, order and judgment dated June 15, 1966 (R. 246-265; 256 F. Supp. 617), the three-judge court again declared the Suffolk government to be unconstitutional and directed as temporary relief that each supervisor cast at future meetings of the board a number of votes equal to the quotient of the population of his town by 5,000 to the nearest whole number with each supervisor having at least one vote. The Court further directed the board to submit to it by July 11, 1966 a plan or plans for reconstitution of the county's legislature in order that the Court might determine the probable validity of any such plan or plans and ordered that at least one "probably valid" plan be submitted for approval to the county's voters at the November 8, 1966 general election, so that a proper legislative body may be elected to take office no later than January 1, 1968.[1]

[1] The respondent Board on August 22, 1966 adopted a permanent reapportionment plan which was approved by the electorate on November 8, 1966. (R. 634-636; 637-649). The plan contained a defeasance clause nullifying the local law in the event this Court invalidated the June 15, 1966 order of the three-judge Court, and the County Attorney has given an opinion that such plan has now been nullified by this Court's vacation of that order. 87 S. Ct. 1544, 1549.

On direct appeal from said June 15, 1966 order and judgment this Court vacated the judgment and remanded the cause to the District Court so that the District Court "may enter a fresh decree from which the appellants may, if they wish, perfect timely appeals" to the United States Court of Appeals. 87 S. Ct. 1544, 1549.

This Court held that it lacked jurisdiction of a direct appeal under 28 U.S.C. § 1253 because the complaint attacked a statute which was of application only to the affairs of one county of the State of New York, and the provisions of 28 U.S.C. § 2281 were unavailable. The Court relied upon *Phillips* v. *United States,* 312 U. S. 246, 254, and vacated the judgment below "since the time for perfecting [an appeal to the United States Court of Appeals] may have passed. . . ." 87 S. Ct. 1549.

On remand petitioners moved for an order confirming, ratifying and adopting all of the orders, decisions and judgments of the three-judge court (R. 642-648). Respondents moved to vacate all of the acts and proceedings of the three-judge court and to dismiss the complaint for failure to state a cause of action and to raise a substantial federal question (R. 649-659). The District Court, Hon. Walter R. Bruchhausen, J., by decision dated June 29, 1967 (Appendix C) dismissed the complaint for failure to state a cause of action (R. 737) notwithstanding the fact that Judge Bruchhausen was a member of the unanimous three-judge court which had twice denied respondents' motions to dismiss the complaint and had ultimately granted injunctive relief to the petitioners.

The petitioners thereupon took their appeals to the United States Court of Appeals (R. 748, 749) which appeals have now been perfected and docketed with that Court. Petitioners now pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review before judgment in that Court the June 29, 1967 decision of the District Court and order of July 22, 1967 entered thereon.

Reasons for Granting the Writ

1. After this Court's decisions in *Moody* v. *Flowers* and the instant case, 87 S. Ct. 1544; *Sailors* v. *Board of Education of the County of Kent,* 87 S. Ct. 1549, and *Dusch* v. *Davis,* 87 S. Ct. 1554, the important constitutional question —whether the provisions of the Equal Protection Clause of the Fourteenth Amendment prevent invidiously discriminatory allocation of voting power upon a county governing body—remains unsettled. This Court recognized that the question is of important constitutional significance by granting certiorari in the case of *Avery* v. *Midland County, Texas,* 87 S. Ct. 2106. Resolution of this question is of compelling importance to all of the citizens of the United States, who are affected by activities of local governments most directly, as more fully set forth in the Brief for the United States as *Amicus Curiae* submitted by the Solicitor General of the United States to this Court in connection with the four local reapportionment cases heard by this Court in April, 1967 and decided May 22, 1967, and especially pages 5-6 thereof.

2. The residents of Suffolk County, New York, are estimated to number in excess of 1,000,000 as of August, 1967 (Long Island Lighting Company). The sole legislative and policy-determining body for the county is the respondent, Board of Supervisors (Laws of New York 1958, c. 278, § 201, Appendix A, p. 4a). There is a grossly invidious discrimination against those residents of the county who, by accident of geography, reside in the five densely populated westermost towns. At the institution of this action in July, 1962, more than five years ago, approximately 10% of the county's population, residing in the sparsely populated eastend towns, enjoyed the same five votes upon the Board of Supervisors as did approximately 90% who resided in the five westend towns. 18% of the county's population, through their representatives upon the county governing

body, could affirmatively adopt legislation not favored by the remaining 82% of the population (Complaint, R. 1-10, Appendix B, p. 11a). These calculations were based upon the 1960 federal census which was already two years old at the institution of this suit. The tremendous growth of the county's population since 1960[2] has worked a vastly greater dilution of the votes of the residents of the westend towns, since these towns in closest proximity to New York City have received the full impact of the population explosion.

The District Court's dismissal of the complaint left the citizens, taxpayers and voters of Suffolk County with no recourse but to prosecute this appeal to remedy the invidiously discriminatory representation scheme as embodied in the Suffolk County Charter. An early reversal of that decision and reinstatement of at least temporary relief is of paramount and pressing importance to the people of the county.

3. The determination below was erroneous and strikes at the heart of representative government on the local level. See *Reynolds* v. *Sims*, 377 U. S. 533, 554, 555; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370; *Wesberry* v. *Sanders*, 376 U. S. 1; *Baker* v. *Carr*, 369 U. S. 186; *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii, 1956), *reversed and dismissed as moot*, 256 F. 2d 728 (C. A. 9, 1958); *cf. Gomillion* v. *Lightfoot*, 364 U. S. 339; *Nixon* v. *Condon*, 286 U. S. 73, 84, 89; *Standard Computing Scale Co.* v. *Farrell*, 249 U. S. 571. Implicit in the District Court's decision is a holding that the federal judicial power does not extend to representational disputes involving local governing bodies, a view necessarily rejected by this Court in reaching the merits of *Sailors* v.

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[2] The 1960 population was 666,384 (U. S. Census). The August, 1967 population is estimated to exceed 1,000,000 (Long Island Lighting Company). Already in 1960, Suffolk was described as "the fastest growing county in the tri-state region [New York, New Jersey, Connecticut]" Regional Plan Association, Bulletin No. 96, September, 1960, "The Race for Open Space", page 69.

Board of Education of the County of Kent, 87 S. Ct. 1549, and *Dusch* v. *Davis,* 87 S. Ct. 1554.

Moreover, in sanctioning a representational system providing not only for local nomination, but also for local *election* of representatives from grossly disparate population districts, the District Court ignored the holding of this Court in *Dusch* v. *Dusch, supra,* in which it was said:

> "If a borough's resident on the council represented in fact only the borough, residence being only a front, different conclusions might follow." 87 S. Ct. at 1556.

In relying upon *South* v. *Peters,* 339 U. S. 276, as supporting the proposition that "Federal courts consistently refuse to exercise their equity powers in cases posing political questions arising from a state's distribution of strength among its political subdivisions" (R. 732, Appendix C, pp. 18a-19a), the District Court completely ignored the implicit reversal of that case by this Court in *Gray* v. *Sanders,* 372 U. S. 368.

In citing *Johnson* v. *Genessee County, Michigan,* 232 F. Supp. 567 (1964), in support of the proposition that "the composition of local units of government is held to be a state matter" (R. 737, Appendix C, p. 22a), and in stating that "this action has encountered five years of intensive litigation" and "[d]uring that period there has been a flood of opinions relating to the subject" (R. 730, Appendix C, p. 17a), the Court ignored the fact that the three-judge court in its February 1, 1965 decision specifically cited and obviously intended to distinguish *Johnson* (R. 90-91; 238 F. Supp. at 1001).

4. The District Court's determination ought promptly to be set aside as an abuse of discretion or beyond the power of the court in light of the prior decisions, orders and judgments of the unanimous three-judge court, of which Judge Bruchhausen was a member. This Court's remand was explicitly not on the merits. In vacating the judgment of June 15, 1966, appealed from, this Court followed the practice

developed in *Phillips v. United States,* 312 U. S. 246, for the specific purpose of preserving to the *then* appellants (respondents here) their right to perfect a timely appeal to the United States Court of Appeals. This Court's vacation of the lower Court's judgment did not seem to be for the purpose of permitting a single District Judge, on remand, to reopen the case and render a contrary decision to that which had been rendered by the three-judge court. Indeed, if respondents, then appellants, had taken the precaution of filing a simultaneous notice of appeal to the Court of Appeals at the time the June 15, 1966 judgment was appealed to this Court, dismissal of the latter appeal without more would have been proper. *Wilentz, et al.* v. *Sovereign Camp, Woodmen of the World,* 306 U. S. 573, 582.

Moreover, this Court in *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 381, specifically held that the final order of a three-judge court improperly convened under then Judicial Code § 266, was still "the final order of a district court although erroneously heard by three judges instead of one and not appealable directly here because not covered by § 266."

Since the improper participation of two additional judges in the proceedings of the former three-judge court did not render those proceedings invalid, the acts, decisions, orders and judgments of that court except as specifically vacated by this Court in its May 22, 1967 decision, should be and remain binding upon all of the parties and upon the court below. *Zdanok* v. *Glidden Company, Durkee Famous Foods Division,* 327 F. 2d 944, cert. den. 377 U. S. 934.[3] The three-judge court, of which Judge Bruchhausen was a member, specifically denied the motion to

[3] Although this Court only vacated the judgment appealed from, Judge Bruchhausen, in denying so much of petitioners' original motion as sought to confirm the status of the Town of Huntington as a party plaintiff and in denying the subsequent motion of the petitioners either to reconsider the earlier decision and permit the Town of Huntington to continue or affirmatively permit the Town of Huntington to intervene, treated all of the acts and proceedings of the three-judge court as a nullity, not merely the final judgment of June 15, 1966.

dismiss the complaint on February 1, 1965.[4] An appeal was taken by the respondents directly to this Court, and it was dismissed without saving them any remedy to appeal to the Court of Appeals (R. 124, 382 U. S. 15). That being so, the March 3, 1965 order denying the motion to dismiss the complaint, and, in effect, granting petitioners summary judgment, became binding upon all.

Further, the decisions of this Court in *Sailors* v. *Board of Education, supra,* and *Dusch* v. *Davis, supra,* do not change the applicable case law: they do not hold that the Equal Protection Clause is inapplicable to local governing bodies. The language of the Court in *Dusch* v. *Davis,* 87 S. Ct. at 1556, strongly implies that this Court would invalidate a system such as was reimposed upon Suffolk County by Judge Bruchhausen. No other intervening facts or decisions justify a stunning reversal of Judge Bruchhausen's earlier decisions.

In filing his decision of June 29, 1967 and order of July 22, 1967, Judge Bruchhausen seems clearly to have exceeded his power under Fed. Rul. Civ. Proc. 60(b) to set aside prior orders and judgments entered with jurisdiction. Since his acts necessarily involved an interpretation of these Rules, this Court may properly, and we respectfully submit should, "deal directly with the District Court" to remedy the situation. See *Schlagenhauf* v. *Holder,* 379 U. S. 104, 112. We also suggest that the procedures followed below call for "an exercise of this Court's power of supervision" over the District Court. See Rule 19(1)(b) of the Rules of this Court.

5. Certiorari should be granted before judgment because of the pressing importance of this case, the fact that this litigation has been in existence for five years, and the citizens of Suffolk County, now numbering more than 1,000,000

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[4] The February 1, 1965 decision and March 3, 1965 order treated the pending motions to dismiss the complaint and for injunctive relief, by stipulation of the parties in open court, as cross-motions for summary judgment (R. 506-507), and in effect gave summary judgment to the petitioners, although not injunctive relief.

persons, are and continue to be deprived of fair representation in the county governing body.

Further, there is presently pending before this Court a case involving a similar or identical question of constitutional importance. *Avery* v. *Midland County, Texas, certiorari granted,* 87 S. Ct. 2106. It would be appropriate for this case, with which the Court is already familiar, to be argued as a companion case to *Avery* during the 1967 term.

The Court invited a petition for certiorari before judgment so that *Bolling* v. *Sharpe,* 344 U. S. 873, could be heard simultaneously with *Brown* v. *Board of Education,* 344 U. S. 1, 3. A similar procedure was followed so that the case of *Taylor* v. *McElroy,* 358 U. S. 918, 360 U. S. 709, 710, and *Greene* v. *McElroy,* 360 U. S. 474, could be heard together.

Moreover, this case presents the basic constitutional question in an appropriate factual setting.[8] As this Court stated in *Sailors* v. *Board of Education of the County of Kent* (87 S. Ct. at 1553):

> "We need not decide at the present time whether a State may constitute a local legislative body through the appointive rather than the elective process. We reserve that question for other cases such as *Moody* v. *Flowers* (*Board of Supervisors* v. *Bianchi*), 386 U. S. ——, 87 S. Ct. 1544, which we have disposed of on jurisdictional grounds."

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[8] The Court will recall that upon oral argument of this case on April 17, 1967 there was a great amount of time devoted to the question whether the Board of Supervisors of Suffolk County, New York exercised legislative powers. Petitioners took the position that this Board, constituting by statute the chief legislative and policy-determining body, and by practice the chief fund-disbursing body for a county of 1,000,000 persons, is doubtless a legislative body in the classical sense. Suffolk was larger in population as of 1960 than the following eight states: Alaska (226,167) Delaware (446,292), Hawaii (632,772), Nevada (285,278), New Hampshire (606,921), North Dakota (632,446), Vermont (389,881) and Wyoming (330,066); Suffolk County: 666,384. World Almanac, 1967, page 325. The members of the Suffolk County Board of Supervisors, unlike the members of the County Board of Education in *Sailors* v. *Board of Education, supra,* are elected directly by the people; and unlike the councilmen in *Dusch* v. *Davis, supra,* Suffolk's supervisors are elected by district, as contrasted with at large.

Finally, it appears from the decision of the Supreme Court of the State of Texas in *Avery* v. *Midland County, Texas*, 406 S. W. 2d 422, that questions under Texas law involved in that case[6] may prevent determination by this Court of the important federal constitutional question, whether the Equal Protection Clause applies to local legislative bodies.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, should be granted before judgment in that Court, to review the July 22, 1967 judgment of the United States District Court for the Eastern District of New York.

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[6] The Texas Supreme Court noted that the county's governmental body, called the "commissioners court" had "negligible" legislative functions under Texas law, 406 S. W. 2d at 426, and that it "is not charged with the management and control of all of the county's business affairs", 406 S. W. 2d at 428. Moreover, the case was remanded to the trial court for entry of a new judgment directing a redistricting which was to take population into account, although population was not to be the sole basis. The judgment of the Texas Supreme Court, because of this remand, does not appear to be a final judgment.

APPENDIX A

Constitutional and Statutory Provisions.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Sections 1983 and 1988

Section 1983. Civil action for deprivation of rights

Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United

States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

28 U.S.C. § 1343 (3) and (4)

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Appendix A.

28 U.S.C. Sections 2201 and 2202

Section 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Appendix A.

Laws of New York 1958 c. 278

Sections 201 and 203 (Suffolk County Charter)

Section 201. The board of supervisors; general powers

The supervisors of the several towns of the county, when lawfully convened, shall constitute the board of supervisors of the county. It shall be the legislative and policy determining body of the county and shall, except as otherwise expressly provided in this charter, have and exercise all the powers and duties of the county together with all the powers and duties which are now, or may hereafter be, conferred or imposed on boards of supervisors by all laws applicable to the county not inconsistent with this charter. The board of supervisors shall also have such other powers and duties as are provided by this charter.

Section 203. Voting; quorum

Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government, for the county or changes the voting strength of the supervisors or which changes the location of the county seat.

APPENDIX B

Complaint.

Plaintiffs, complaining of the defendants, respectfully allege as follows:

FOR A FIRST CAUSE OF ACTION

FIRST: The plaintiffs bring this action pursuant to the Civil Rights Act, United States Code Title 42, Sections 1983 and 1988. This Court has original jurisdiction of the action by virtue of United States Code Title 28, Sections 1343(3) and 1343(4). Relief hereunder is also sought pursuant to the Federal Declaratory Judgment Act, United States Code Title 28, Sections 2201 and 2202.

SECOND: Under United States Code Title 28, Section 2281 *et seq.*, provision is made for the convening of a three-judge district court, where the relief requested is an interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restricting the action of any officer of such state in the enforcement or execution of such statute. Plaintiffs seek such relief and request the convening of a three-judge court.

THIRD: The plaintiffs are citizens of the United States and of the State of New York; taxpayers of the State of New York and of Suffolk County in the State of New York, hereinafter referred to as Suffolk County; and qualified voters entitled to vote for supervisors in the townships of their respective residence and for all elective officials voted upon by all of the voters of Suffolk County. Plaintiff I. William Bianchi, Jr., resides in the Town of Brookhaven, Suffolk County; plaintiff Quentin B. Sammis resides in the

Town of Huntington, Suffolk County. The plaintiffs jointly and severally bring this action in their own behalf and in behalf of all other persons, citizens, taxpayers, and voters in Suffolk County similarly situated.

FOURTH: The defendants are the Supervisors of the townships in Suffolk County of their respective residence as follows: defendant Evans K. Griffing is the Supervisor of, and resides in, the Township of Shelter Island; defendant William P. Bain is the Supervisor of, and resides in, the Township of East Hampton; defendant Lester M. Albertson is the Supervisor of, and resides in, the Township of Southold; defendant William J. Leonard is the Supervisor of, and resides in, the Township of Riverhead; defendant Stephen F. Meschutt is the Supervisor of, and resides in, the Township of Southampton; defendant Ralph J. Osgood is the Supervisor of, and resides in, the Township of Smithtown; defendant Charles R. Dominy is the Supervisor of, and resides in, the Township of Brookhaven; defendant Robert J. Flynn is the Supervisor of, and resides in, the Township of Huntington; defendant Arthur M. Cromarty is the Supervisor of, and resides in, the Township of Babylon; and defendant Thomas J. Harwood is the Supervisor of, and resides in, the Township of Islip; and the defendants together constitute the Board of Supervisors of Suffolk County, hereinafter referred to as the Board of Supervisors.

FIFTH: Suffolk County is subdivided into ten separate and distinct townships, the citizens of which elect a supervisor who is the chief executive of the government of his township, and who also represents all of the citizens of his township as a member of the County Board of Supervisors wherein he functions exclusively as a county legislator, county officer, and state officer.

Appendix B.

SIXTH: The defendants in their collective capacity as the Board of Supervisors of Suffolk County and pursuant to Sections 201 through 208 of Chapter 278 of the Laws of New York 1958, known as, and hereinafter referred to as, the Suffolk County Charter, are "the legislative and policy determining body of the county"; have and exercise "all the powers and duties of the county" together with all the powers and duties which have heretofore been, or which may hereafter be, conferred or imposed upon boards of supervisors by all laws enacted by the Legislature of the State of New York applicable to Suffolk County; and, in addition thereto, specifically are required by the Suffolk County Charter to exercise, and do exercise the following powers, among others:

(1) All powers of legislation as provided in article nine of the constitution of the state and the Suffolk County Charter;

(2) To adopt, amend and repeal local laws as provided by law and for the purpose of making effective any of the provisions of the Suffolk County Charter and to carry out all powers conferred upon the county or the board of supervisors by any other law;

(3) Except as otherwise provided in the Suffolk County Charter, to create, organize, alter and abolish departments, commissions, bureaus, offices and employments and/or transfer their functions and duties not inconsistent with said charter;

(4) Except as otherwise provided in the Suffolk County Charter and subject to the constitution and general laws of the state, to fix the compensation of all officers and employees of the county paid from county funds, except members of the judiciary;

(5) To fix the amount of the bond to be given by any official or employee of the county, conditioned on the faithful performance of his duty, and make the premiums of such bonds a county charge;

(6) To make appropriations, levy taxes and incur indebtedness for the purpose of carrying out any of the powers and duties conferred or imposed on the county or any officer, board, commission or other authority thereof, by the Suffolk County Charter or otherwise by law;

(7) To employ such legal, financial or other advisors as it may from time to time deem necessary for the performance of any of its functions.

SEVENTH: The defendants, in their collective capacity as the Board of Supervisors of Suffolk County, pursuant to various laws and statutes, and by long-standing custom and practice in the State of New York, are required to exercise, and do exercise, certain powers in addition to those set forth in paragraph SIXTH hereof, as officers of, and for and in behalf of, the State of New York.

EIGHTH: Each defendant without reference to the number of persons in his township whom he represents, in his capacity as a member of the Board of Supervisors casts but one vote in exercising the powers set forth in paragraphs SIXTH and SEVENTH hereof, in accordance with Section 203 of the Suffolk County Charter, which provides as follows:

§ 203. Voting; quorum

Each supervisor shall have one vote. A majority of the whole number of the members of the board shall constitute a quorum. Except as otherwise provided by law, local laws and resolutions shall be adopted by a

vote of not less than a majority of the total membership of the board. In case of a tie vote on any matter at any meeting of the board of supervisors the county executive shall have a casting vote, provided, however, that he shall not have a vote as to any local law or resolution which provides a new form of government, for the county or changes the voting strength of the supervisors or which changes the location of the county seat.

NINTH: The populations of the townships of Suffolk County for the years 1960, 1950 and 1940, as set forth in the United States Census of Population 1960, Number of Inhabitants, New York Final Report (P.C. [1] 34A) were respectively as follows:

	1960	*1950*	*1940*
Shelter Island	1,312	1,144	1,073
East Hampton	8,827	6,325	6,529
Southold	13,295	11,632	12,046
Riverhead	14,519	9,973	8,922
Southampton	26,861	16,830	15,295
Smithtown	50,347	20,993	13,970
Brookhaven	109,900	44,522	32,117
Huntington	126,221	47,506	31,768
Babylon	142,309	45,556	24,297
Islip	172,959	71,465	51,182

TENTH: Upon information and belief, the populations of the townships as of January 1, 1962 were respectively as follows:

Shelter Island	1,367
East Hampton	9,602
Southold	13,977
Riverhead	15,281
Southampton	29,654
Smithtown	60,863
Brookhaven	122,367
Huntington	138,656
Babylon	155,459
Islip	191,280

Appendix B.

ELEVENTH: Because of the gross disparity in population among the townships in Suffolk County, as set forth in paragraphs Ninth and Tenth, the present arrangement under and by virtue of which each member of the Board of Supervisors casts one vote in functioning both as a county and a state official, results in an arbitrary impairment of the votes of the plaintiffs and of all those similarly situated by means of an invidiously discriminatory geographic classification, which deprives plaintiffs and all other similarly situated of liberty and property without due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

TWELFTH: In addition to arbitrarily impairing the votes of those situated as plaintiffs, as set forth in paragraph Eleventh, the present arrangement of representation arbitrarily exalts the voting strength of persons residing in the less populous and rural townships with no justification other than the present invidiously discriminatory geographic classification. Each defendant, in casting one vote as a member of the Board of Supervisors, represents the following approximate percentage of the total population of Suffolk County:

Griffing (Shelter Island)	1/5%
Bain (East Hampton)	1½%
Albertson (Southold)	2%
Leonard (Riverhead)	2¼%
Meschutt (Southampton)	4%
Osgood (Smithtown)	8%
Dominy (Brookhaven)	16%
Flynn (Huntington)	19%
Cromarty (Babylon)	21%
Harwood (Islip)	26%

Appendix B.

Defendants Griffing, Bain, Albertson, Leonard and Meschutt, representing approximately 9.95% of the county population having five votes on the Board of Supervisors, can prevent passage by the Board of measures favored by 91% of the county population, represented by defendants Osgood, Dominy, Flynn, Cromarty and Harwood, who also have only five votes. If defendant Osgood votes with the five defendants first named, approximately 18% of the county population, represented by six votes on the Board of Supervisors, can enact legislation not favored by approximately 82% of the population; all of which is in violation of the Fourteenth Amendment of the Constitution of the United States.

THIRTEENTH: The present discriminatory arrangement is contrary to the prevailing philosophy of government in the United States and all Anglo-Saxon jurisdictions, in which the legislative body has the power to make laws only because it has the power and duty to represent the people.

FOURTEENTH: The arbitrary impairment of the votes of the plaintiffs and of all those similarly situated, as hereinbefore set forth, results in an unjust and unequal application of funds available to Suffolk County to projects not favored by more than a small minority of the Citizens of the United States residing in the county. The revenues available to be disbursed and allocated by defendants on behalf of the county, in their capacity as the Board of Supervisors derive in the main from two sources: (1) from taxes levied by the county upon real property in the county; and (2) from the State of New York, which raises such revenues by levying and continuing to levy taxes upon the incomes of citizens of the United States residing in the State of New York, including Suffolk County. The unjust and unequal application of these funds, to which plaintiffs

and those similarly situated are required to, and do, contribute, in the form of real property tax to Suffolk County and an income tax to the State of New York, constitutes taxation without representation.

FIFTEENTH: The arbitrary impairment of the votes of the plaintiffs and those similarly situated has become more invidiously discriminatory since January 1, 1962, and continues to become more discriminatory with the passage of time, as the result of an ever-increasing population influx into the townships of Babylon, Brookhaven, Huntington, Islip and Smithtown, while the populations of the other five townships have remained relatively constant. The unequal growth of the five townships mentioned above, comprising the western portion of the county, is the result in part of their geographic proximity to heavily populated Nassau County and the City of New York. The five western townships, already suburban in character, are rapidly tending to become urban, while the five eastern townships remain rural and agricultural in nature. As alleged in paragraph Tenth, the total population of the five western townships as of January 1, 1962, was 668,625, while the total population of the five eastern townships was 69,881.

SIXTEENTH: The defendants and their predecessors in office have complied, and it must be presumed that they will continue to comply, with the provisions of the Suffolk County Charter until such time as such provisions shall be declared by competent authority to be invalid. Defendants or their successors in office, unless prevented by a court of competent jurisdiction, must perform their duties as they and their predecessors in office have performed them since enactment of the Charter, unless and until such court should declare the voting provision contained in

Section 203 of the Charter to be invalid; and until such time as such voting provision is declared invalid it must be presumed that the inequity and discrimination alleged in this complaint will continue.

[Second cause of action was withdrawn and is omitted.]

WHEREFORE, plaintiffs pray

(1) That the Court take jurisdiction of this case;

(2) That a special three-judge Court be convened to hear and determine the case as provided by United States Code Title 28, Sections 2281 *et seq.;*

(3) That judgment be granted for such declaratory and injunctive relief as may be proper to assure the plaintiffs and all others similarly situated of due process and of equal protection of the laws, as follows:

(i) Declaring void and invalid, as being violative of the Fourteenth Amendment of the Constitution of the United States, so much of Section 203 of the Suffolk County Charter as provides that the defendants shall each have one vote as members of the Suffolk County Board of Supervisors;

(ii) Declaring void and invalid, as being violative of the Fourteenth Amendment of the Constitution of the United States, the present practice by virtue of which each defendant casts one vote as a member of the Suffolk County Board of Supervisors;

(iii) Enjoining the defendants from acting in in their collective capacity as the Board of Supervisors of Suffolk County unless and until a constitutional change in their

relative voting strength is duly made and adopted pursuant to applicable law, except that said defendants might act insofar as is necessary to initiate or effectuate any such change;

(iv) That the Court retain jurisdiction of this action to review any such change and to insure to the plaintiffs the rights guaranteed them by the Fourteenth Amendment of the Constitution of the United States;

(v) Granting plaintiffs such other, further or different relief as may seem just or proper in the premises.

s/ FREDERIC BLOCK
FREDERIC BLOCK
Office & P. O. Address
305 Patchogue Road
Port Jefferson Station
New York; and

CAHN AND CAHN

by: s/ RICHARD C. CAHN
Office & P. O. Address
425 New York Avenue
Huntington, New York,
Attorneys for Plaintiffs.

APPENDIX C

Decision of the District Court, June 29, 1967

BRUCHHAUSEN, D. J.

The plaintiffs, I. William Bianchi and Quentin B. Sammis, residents of the Towns of Brookhaven and Huntington, Suffolk County, State of New York, brought this action in their own behalf and in behalf of all other taxpayers and voters of the said County. Subsequently the Town of Huntington was made a party plaintiff.

Each of the ten individual defendants is an elected supervisor of his respective town. They collectively constitute the Board of Supervisors of the said County.

The plaintiffs, in their complaint, alleged that because of the gross disparity in population of the townships, each member of the said Board of Supervisors casts one vote in functioning as a County and a State official, resulting in an arbitrary impairment of the votes of the plaintiffs and all those similarly situated; that the system arbitrarily exalts the voting strength of persons residing in the less populous and rural townships with no justification other than the present invidiously discriminatory geographic classification and that such classification is in violation of the Fourteenth Amendment of the Constitution of the United States.

The plaintiffs' demand for relief, as stated in the complaint, is as follows:

(1) To declare void and invalid under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution so much of Section 203 of the Suffolk County Charter enacted by the Legislature of the State of New York in the year 1958 as Chapter 278 of the Laws of that year, as provides that each Supervisor shall have one vote as a member of the Suffolk County Board of Supervisors.

(2) To enjoin the defendants from acting as the Board of Supervisors unless and until a change in their voting strength is made.

(3) To cause to be convened a three-judge court to hear and determine the case (28 U.S.C. § 2281 et seq.).

The defendants moved to dismiss the complaint upon the ground, amongst others, that no substantial federal question was raised. The motion was denied without prejudice to renewal before a three-judge court. See *Bianchi* v. *Griffing*, 217 F. Supp. 166 (E.D.N.Y. 1963). Thereafter, a three-judge court was convened and a hearing was held, at which the motion to dismiss was renewed.

The first opinion of the three-judge court, dated February 1, 1965, is reported in 238 F. Supp. 997. The Supreme Court of the United States dismissed the appeal from the order entered thereon, 382 U. S. 15, for want of jurisdiction.

The second opinion of the three-judge court, dated June 15, 1966, is reported in 256 F. Supp. 617. The supplemental opinion order, dated August 4, 1966, is not reported. The defendants appealed therefrom to the United States Supreme Court. The said court, in an opinion, dated May 22, 1967, held that the said Charter provision "is one of limited application, concerning only a particular county involved in the litigation" and that "a three-judge court was improperly convened" and vacated the judgment therein and remanded the cause to the court which heard the case (the court whereover Judge Bruchhausen presides) so that it might enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the United States Court of Appeals for this Circuit.

The plaintiffs now move this court to adopt all of the prior decisions, orders and judgments of the improperly convened three-judge court, or for other relief detailed in their notice of motion.

Appendix C.

The defendants move to vacate all orders of the three-judge court, also for other relief. They also renew their motion to dismiss the complaint, made at the inception of this litigation.

The Charter under attack is a State statute, applying solely to Suffolk County.

The plaintiffs do not claim a violation of a federally protected right, whereby a person is denied his vote because of his race. *Gomillion* v. *Lightfoot,* 364 U. S. 339. See also *Dusch* v. *Davis,* United States Supreme Court, May 22, 1967.

The local government system in Suffolk County is not of recent origin. The County was formed in 1683 (See McKinney's Consolidated Laws). The election of Supervisors at annual Town meetings including representation of their Towns on the Board of Supervisors emanated more than 250 years ago. (See Chapter 133 of the Laws of 1703.)

It is common knowledge that in the intervening period, the populations of the Western Towns of the County have surpassed those of Eastern Towns.

However, population disparity, without other factors does not render a local system unconstitutional.

The gravamen of the complaint in this action is that there is a gross disparity in the population of the Townships, without justification other than the present invidiously discriminatory geographic classification.

This action has encountered five years of intensive litigation, encompassing many hours of argument, accompanied by numerous briefs. During that period there has been a flood of opinions, relating to the subject.

In *Colegrove* v. *Green,* 328 U. S. 549 (1946), the qualified voters in Congressional districts of Illinois claimed lack of equality of population in violation of the Constitution of the United States. The Supreme Court affirmed the order, dismissing the complaint for want of equity and held that Congress has power to remedy Congressional apportion-

ment. In the majority opinion, at page 556, Mr. Justice Frankfurter stated:

> "To sustain this action would cut very deep into the very being of Congress. Court ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Contitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."

Mr. Justice Rutledge in his concurring opinion stated at page 565:

> "In the * * * case of Wood v. Broom, 287 U. S. 1 (1932), the Court disposed of the cause on the ground that the 1929 Reapportionment Act, 46 Stat. 21, did not carry forward the requirements of the 1911 Act, 37 Stat. 13, and declined to decide whether there was equity in the bill. 287 U. S. 1, 8. But, as the Court's opinion notes, four justices thought the bill should be dismissed for want of equity.
>
> "In my judgment this complaint should be dismissed for the same reason. Assuming that the controversy is justiciable, I think the cause is of so delicate a character, in view of the considerations above noted, that the jurisdiction should be exercised only in the most compelling circumstances."

In *South* v. *Peters,* 339 U. S. 276 (1950), it appears that the District Court dismissed the complaint whereby plaintiffs sought an order, restraining adherence to a county unit system in a forthcoming primary election. The Court at page 277 said:

> "The court below dismissed appellants' petition. 89 F. Supp. 672. We affirm. Federal courts consistently

refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. See MacDougall v. Green, 335 U. S. 281 (1948); Colegrove v. Green, 328 U. S. 549 (1946); Wood v. Broom, 287 U. S. 1, 8 (1932); cf. Johnson v. Stevenson, 170 F. 2d 108 (C. A. 5th Cir. 1948)."

In *W.M.C.A. Inc.* v. *Simon,* 208 F. Supp. 368 (1962), the plaintiffs sought a judgment, declaring the State's constitutional and statutory provisions governing apportionment of Senate and Assembly Districts unconstitutional.

In the Supreme Court's remand of the case, reported in 370 U. S. 190 (1962), the per curiam opinion stated:

"* * * we held in Baker v. Carr, 369 U. S. 186 (1962), that a justiciable federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification."

In the majority opinion of *Baker* v. *Carr, supra,* Mr. Justice Brennan, stated:

"* * * it [is] open to courts * * * to determine * * * that a discrimination reflects no policy, but simply arbitrary and capricious action.

" 'Invidious discrimination' is an irrational and inconstant action against a group of citizens. We do not find that New York State apportionment policy is irrational; all that plaintiffs have illustrated is that the apportionment is not based solely on population. But as we said in MacDougall v. Green, 335 U. S. 281, 283, 69 S. Ct. 1, 2.

"To assume that political power is a function exclusively of numbers is to disregard the practicalities of government."

Appendix C.

There are criteria other than population for determining apportionment. In *Baker* v. *Carr,* Mr. Justice Harlan said, in a dissenting opinion:

> "Nothing in the Federal Constitution [stops] a State * * * from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people. * * *"

In *W.M.C.A. Inc.* v. *Simon,* 202 F. Supp. 741, Judge Ryan, in a concurring opinion, at page 754, stated:

> "There is no claim made here that the apportionment formula before us or the laws enacted to apply it effect a discrimination against any particular racial or religious group. The complaint is that the method of apportionment gives rise solely to territorial or purely geographical discrimination which grossly dilutes the vote of urban dwellers. Judicial interference by federal courts with the power of the state to create internal political or geographical boundaries affecting the right of suffrage can not be supported by mere territorial discrimination and nothing more."

In *Reynolds* v. *Sims,* 377 U. S. 533 (1964), the Court at page 575, held in part:

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U. S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted

to them' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State'."

As previously stated, Section 203 of the Suffolk County Charter accords each member of the Board of Supervisors one vote. Section 205 thereof provides that in the event of a tie the presiding officer shall cast the deciding vote.

To the same effect is *Tedesco* v. *Board of Supervisors of Elections,* La. App., 43 So. 2d 514. 339 U. S. 940.

In *Johnson* v. *Genesee County, Michigan,* 232 F. Supp. 567 (1964), the court was confronted with a similar problem. The plaintiffs, claiming imbalance in the voting system, sought an injunction, restraining action of county commissioners. The Court reviewed the applicable law and held in part, at page 570:

"Neither the Fourteenth Amendment, nor Article 4 of the Constitution of the United States, has so far been interpreted by the Supreme Court of the United States to require the apportionment of local legislative bodies in a state in accordance with population. Article 4, Section 4, provides

" 'The United States shall guarantee to every State in this Union a Republican Form of Government, * * *.'

"This is a guarantee to the states, as such. See Texas v. White, 7 Wall. 700, 19 L. Ed. 227. This guarantee does not extend to systems of local government for municipalities, counties, or parishes. State ex rel. Portiere v. Smith, 184 La. 263, 166 So. 72.

"How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835.

"See also Eckerson v. City of Des Moines, 137 Iowa 452, 115 N. W. 177:

"'It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decision of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state.'"

Further quoting from Johnson, at page 572:

"Under the prevailing view of the United States Supreme Court, as we have pointed out above, the composition of local units of government is held to be a state matter."

Upon due deliberation the Court concludes that the complaint fails to state a cause of action and should be dismissed.

The defendants' motion is granted and the plaintiffs' motion is denied.

Settle order on ten (10) days' notice.

WALTER BRUCHHAUSEN
U.S.D.J.

APPENDIX D

Order of the District Court, July 22, 1967.

The plaintiffs in this action having filed their complaint herein on July 27, 1962, in which they asked for the convention of a three-judge Court, and such a Court having been convened and its orders and judgments having thereafter been vacated by a mandate of the United States Supreme Court filed June 20, 1967, and the plaintiffs having thereafter moved for the ratification by this Court of the orders and judgments of the three-judge Court and the defendants having cross-moved and renewed their motion to dismiss the complaint, and due deliberation having been had and the Court having made and filed its decision in writing, it is

ORDERED that the plaintiff's motion for ratification of the orders and judgments of the three-judge Court be and it hereby is denied, and it is further

ORDERED that the defendants' motion to dismiss the complaint be and it hereby is granted, and it is further

ORDERED AND ADJUDGED that the complaint be and it hereby is dismissed and the motions for reargument and intervention of the Town of Huntington as a party plaintiff are denied.

Dated: July 22, 1967.

WALTER BRUCHHAUSEN,
United States District Judge.

A true copy attest Aug. 1, 1967,

LEWIS ORGEL,
Clerk.

By JAMES R. ABRAM,
Deputy Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 591

I. WILLIAM BIANCHI, JR., ET AL., PETITIONERS

v.

EVANS K. GRIFFING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

For the reasons developed at length in our brief of last Term, we regard the recent decision of the district court (Pet. App. 15a–23a) in this case as clearly erroneous, and we believe it would not be inappropriate for the Court to grant certiorari at this juncture, *i.e.*, before judgment in the court of appeals, in order to resolve the important constitutional question presented.

Presently pending before the Court and awaiting argument is a closely related case—*Avery* v. *Midland County, Texas,* No. 39, this Term, in which certiorari was granted on June 12, 1967. Both cases pose the same basic constitutional issue left unresolved last Term—whether the equal-population principle of *Rey-*

276-962—67

nolds v. *Sims*, 377 U.S. 533, is applicable at the local governmental level. As petitioner points out (Pet. 11), this Court has followed the procedure of granting certiorari before judgment in a court of appeals in order to have two or more cases before it which, while presenting the same general question, involve variant factual circumstances.[1] This, in our view, is an appropriate occasion for taking that step.[2] While the resolution which the government intends to urge in *Avery* would seem to be clearly controlling in the instant case as well, it appears desirable that the Court have before it another case in addition to *Avery* so as to provide a broader framework for considering and resolving the constitutional issue. For that purpose, it seems wholly proper to advance the instant case, already once fully briefed and argued in this Court.[3]

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[1] In addition to the instances cited by petitioner, see those cited in Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951 ed.), § 131, pp. 235–236, n. 2; see also *United States* v. *Thomas*, 361 U.S. 950, 362 U.S. 58, 59; *Hannah* v. *Slawson*, 361 U.S. 910, 363 U.S. 420, 422, n. 3.

[2] To be sure, last Term we suggested that a narrow reading of 28 U.S.C. 2281—which required a remand of this case without reaching the merits—would serve the salutary end of channelling most appeals in this category of cases to the courts of appeals, rather than directly to this Court. That consideration appears inapposite here, however, since it is premised on the Court's having resolved the constitutional question in favor of applicability. Indeed, since the question remains open, taking up this case now may serve to promote judicial economy by affording the Court a broader factual setting for its determination of that question.

[3] Granting certiorari here and setting the instant case down for argument along with *Avery* need not result in any significant delay in this Court's consideration and decision in *Avery*. The only intervening development since the case was here last Term is the decision of the district court dismissing the com-

For these reasons, the government supports the granting of certiorari before judgment in the instant case, and suggests that it would be appropriate to set it down for argument along with *Avery*.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

SEPTEMBER 1967.

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plaint. If thought desirable, therefore, an accelerated briefing schedule would appear quite feasible here, and considerable reliance could be placed on the papers prepared and filed in the case last Term, including, of course, the printed record.

U.S. GOVERNMENT PRINTING OFFICE: 1967